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IN THE

# SUPREME COURT OF THE UNITED STATES

**October Term, 1971**

**No. 71-1011**

MAURICE A. GELLIS,

*Petitioner*

vs.

CITY OF SAVANNAH, CHATHAM COUNTY, GEORGIA; J. CURTIS LEWIS, JR., MAYOR, BENJAMIN M. GARFUNKEL, MAYOR PRO TEM, W. T. GAUDRY, EDWARD A. PERKINS, J. M. STUBBS AND JOSEPH R. MYATT, ALDERMEN, CITY OF SAVANNAH, CONSTITUTING THE CITY COUNCIL, CITY OF SAVANNAH,

*Respondents*

## Brief In Opposition To A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JAMES B. BLACKBURN, Attorney for the Mayor and Aldermen of the City of Savannah and the former Aldermen, Individually
American Bldg., Savannah, Ga. 31401

JACK H. USHER, former City Attorney and Attorney for former Aldermen, Individually
17 E. Perry St., Savannah, Ga. 31401

JOHN W. SOGNIER, Attorney for J. Curtis Lewis, Jr., former Mayor, Individually
718 Realty Bldg., Savannah, Ga. 31401

JOHN G. KENNEDY, Attorney for J. Curtis Lewis, Jr., former Mayor, Individually
718 Realty Bldg., Savannah, Ga. 31401

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IN THE

# SUPREME COURT OF THE UNITED STATES

## October Term, 1971

**No. 71-1314**

MAURICE A. GELLIS,

*Petitioner*

VS.

CITY OF SAVANNAH, CHATHAM COUNTY, GEORGIA; J. CURTIS LEWIS, JR., MAYOR, BENJAMIN M. GARFUNKEL, MAYOR PRO TEM, W. T. GAUDRY, EDWARD A. PERKINS, J. M. STUBBS AND JOSEPH R. MYATT, ALDERMEN, CITY OF SAVANNAH, CONSTITUTING THE CITY COUNCIL, CITY OF SAVANNAH,

*Respondents*

## Brief In Opposition To A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

## I

"A Standard State Zoning Enabling Act Under Which Municipalities May Adopt Zoning Regulations," recommended by the U. S. Department of Commerce, 1926, is not in any way applicable to the case.

## II

## QUESTIONS PRESENTED

1. Does Gellis, an optionee of certain real property zoned under the ordinances of the city of Savannah as a Planned Office Center District (hereinafter referred to

as P-O-C) after the expiration of his option have a right to a declaratory judgment declaring said ordinance creating said district unconstitutional since the constitutionality of the ordinance as to him became moot when his property interest ceased?

2. Is the P-O-C zoning ordinance clearly arbitrary and unconstitutional or does it bear a substantial relationship to the public health, safety, morals and general welfare so as to be a proper exercise of the police powers of the municipality?

3. Do the petition and affidavits of the plaintiff, Gellis, show a cause for damages under section 1985 of the Civil Rights Act against the defendants individually in view of their exercise of their legislative discretion and the affidavits filed on their behalf?

## III

## STATEMENT OF THE CASE

Gellis, plaintiff in this action, now petitioner, was an optionee of certain real property in Savannah, Georgia, and he brought action against the defendants, the City of Savannah and The Mayor and Aldermen, individually, now respondents, contending that the zoning of this property, known as Blocks 123, 124, 147, 148, 153, 154, 177 and 178, Oakdale Subdivision, as a P-O-C zone is unconstitutional and confiscatory of the above property and sought a declaratory judgment to this end (A-3 thru A-28). (1)

As a second cause Gellis alleged a conspiracy among the several Aldermen and Mayor individually and with others to deprive him of his constitutional rights under-

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(1) References to Appendix are to the Appendix filed in the Fifth Circuit Court of Appeals which have been forwarded as a part of the record.

neath the Civil Rights Act of the United States, Code Title 42, Sections 1983 and 1985, and asked judgment against the several defendants in their individual capacities in the amount of $3,000,000.00 (A-29 thru A-34).

The City and The Mayor and Aldermen individually filed answer (A-154) and motions to dismiss to both causes (A-152). Gellis filed a motion for summary judgment (A-35) in all matters except damages and filed an affidavit against defendants' motion for summary judgment (A-170).

The City and The Mayor and Aldermen individually filed affidavits in opposition to Gellis's motion for summary judgment (A-56, A-61, A-170 thru A-192) and filed their own motion for summary judgment (A-198) based on said affidavits, pleadings and the deposition of Ewell Alexander (A-203), an employee of Savannah Electric and Power Company, owner of the land in question.

The Chief Judge of the United States District Court, Southern District of Georgia, the Honorable Alexander A. Lawrence, heard the motions for summary judgment. On the 9th day of July, 1971, the judge sustained the motion for summary judgment filed by the City of Savannah and the Mayor and Aldermen individually, overruled Gellis's motion for summary judgment and dismissed the complaint from which order Gellis appealed to the Fifth Circuit Court of Appeals who affirmed. Now Gellis seeks a writ of certiorari.

Plaintiff Gellis was an optionee, under contract dated September 12, 1969, with the Savannah Electric and Power Company, of real property in Savannah, described heretofore (A-213), and requested The Mayor and Aldermen of the City of Savannah to amend the existing Planned Office Center ordinance so he could erect two

high-rise apartment buildings and one office building on said land.

Gellis's option gave him six months from the date of the agreement to obtain zoning variances and modification with the provision that, if the rezoning attempt is still pending before the City of Savannah, it will be extended automatically until a final determination is had in accordance with the rules and procedures of the Zoning Board of Appeal of the City of Savannah. The contract further provided, in paragraph 11, that, should the municipal ordinances and authorities of the City of Savannah finally deny purchaser's petition for zoning variances and modification so as to permit the construction of a high-rise apartment building and general office building, then the purchaser, Gellis, should have seven days to elect whether or not he wished to proceed with the purchase of said property under the then-existing zoning ordinance. No election was made and the contract was not extended or modified. Paragraph 2 provides that the purchaser, Gellis, shall have no obligations if he fails to obtain the zoning variance. (Appendix and deposition of Alexander.)

Gellis obtained a special meeting of a Savannah Metropolitan Planning Commission committee on January 22, 1970, for the purpose of reviewing and presenting his plan for a development of the subject property zoned Planned Office Center (A-123). This meeting was held on January 22 with the understanding that a later presentation would be presented to the regular Metropolitan Planning Commission meeting of February 17, 1970 (A-130).

On February 17, 1970, Gellis presented his proposal to the entire Planning Commission. A Mr. Simpson, an attorney representing protesters, was granted permission

to speak. The Metropolitan Planning Commission rejected the development plan of Gellis for an apartment and office complex within the P-O-C zoning district as not being permitted in the district.

Gellis's plan never met the parking requirements of the P-O-C zone (A-60).

Gellis, therefore requested that the planned office center zoning ordinance be amended so as to permit multi-family dwellings, reduce parking space requirements from one per 200 square feet to one per 500 square feet, permit personal service shops and stores or office building, and reduce further the parking requirements 20 per cent by permitting the sharing of parking facilities. The Metropolitan Planning Commission denied his petition at its meeting of March 24, 1970 (A-148).

The Metropolitan Planning Commission's recommendation to The Mayor and Aldermen of the City of Savannah that Gellis's petition be denied was then forwarded to the May 1, 1970, meeting of The Mayor and Aldermen of the City of Savannah. The Mayor and Aldermen heard said matter, accepted the adverse recommendations of the Metropolitan Planning Commission and voted to deny Gellis's petition for an amendment to the P-O-C zone (A-192). The matter was handled normally in all respects and no conspiracy was directed against Gellis (A-173 thru A-196).

At no time did Gellis request the rezoning of the subject property nor pursue further with the Zoning Administrator or the Zoning Board of Appeals the Metropolitan Planning Commission's decision that his project was not permissible in the area but sought only the amendment to the text of an existing zone (A-58, A-189, A-192).

Gellis's option expired when the Mayor and Aldermen denied his request (A-219). The subject property's uses under P-O-C are broad and permit many feasible and profitable uses of the property (A-118, A-188, A-60).

At the May 1, 1970, meeting of the City Council, protests were heard to the text amendment proposed and it was brought out in said protest that the buildings would interfere with Hunter Army Air Base's flight patterns. Traffic problems would be created endangering the children using the nearby Y.M.C.A. (adequate parking was not provided for in the plan), and P-O-C zoning ordinances did not permit apartments (A-194, A-195).

The Mayor and Aldermen, when acting upon the petition at the May meeting, were engaged in a legislative function considering the petition of Gellis for a text amendment to the Zoning Ordinance of the city. The present zoning complained of was enacted prior to any of the defendants being members of the governing council of the city and prior to Gellis obtaining an option on the property, the present zoning of the property having been enacted in the year 1962, at the time when it was purchased by the Savannah Electric and Power Company. No evidence of any racial questions or minority groups being involved with the proposed apartment building and office building was offered.

No conspiracy was ever entered into against Mr. Gellis (A-173 thru A-186, A-56, A-61).

Judge Lawrence, the Senior Judge of the Federal District Court, had no interest in the matter whatsoever. The fact that Judge Lawrence was formerly associated with the law firm mentioned was well known to all members of the Bar and there was absolutely no reason why Gellis could not have raised this point in the lower court if it was at all applicable or pertinent.

Gellis, upon the decision of the Federal District Court, appealed to the Fifth Circuit Court of Appeals which sustained the lower court and now he seeks writ of certiorari.

## IV

## ARGUMENT

### ISSUE 1

**THE ISSUE ON DECLARATORY JUDGMENT IS MOOT.**

The contract between Gellis and the Savannah Electric and Power Company provides that if the municipal authorities (City of Savannah) shall finally deny purchaser's petition for zoning variances to permit the construction of so-called high-rise apartment buildings and a general office building, the purchaser, at his election, may determine to use the property for general office purposes as provided by the zoning established by the city and, with in seven days after notifying the seller, elect to consummate the purchase (A-219). Gellis did not give any written notice to the seller that he elected to consummate the purchase of the property. The contract was for a six month period or until a final determination by the City of Savannah (A-219) which event has long since occurred. Thus, at the time of the bringing of suit Gellis no longer had a property interest in the real estate. Gellis's interest in the property having ceased, he no longer was entitled to seek a declaratory judgment or injunctive proceedings concerning the zoning of the property as the issue under the declaratory judgment was moot. *U.S.* v. *Hanlon*, D.C., Pa. 1956, 165 F. Supp. 1. *Tomkins* v. *City of Greensboro, N. C.*, D.C., N.C., 1958, 162 F. Supp. 544, *National Hairdressers & Cosmetologists' Assn.* v. *Philad Co.*, D.C., Del. 1944, 4 F.R.D. 106.

## ISSUE 2

**THE PLANNED OFFICE CENTER ZONING IS CLEARLY CONSTITUTIONAL AS IT DOES BEAR A SUBSTANTIAL RELATIONSHIP TO THE PUBLIC HEALTH, SAFETY, MORALS AND GENERAL WELFARE AND IS A LEGITIMATE EXERCISE OF THE CITY'S POLICE POWER.**

It has been held in testing a zoning ordinance that is claimed to be in violation of the due process and equal protection clauses of the Constitution, that the sole question is whether there is a rational relationship between the ordinance and the promotion of some aspect of the city's police powers, a label which describes the full range of legitimate public interest. See *Stone v. City of Maitland,* Fifth Circuit Court of Appeals No. 30474 decided August 4, 1971, wherein *Mayhue v. City of Plantation, Florida,* 375 F. 2d 447, 449, is cited.

A review of the ordinance in question (A-113) shows that a planned office center district is for the purpose of promoting the development of large-scale planned office centers on suitable tracts of land, four acres or more in size, under single ownership. Certain limitations on the number of buildings, the setback and screening from residential property, ratio of floor area to ground area, front and side yard setbacks and off-street parking are requirements shown. Then a wide variety of distinct uses are provided for the area (A-113).

There appears to be nothing unreasonable or arbitrary concerning the zoning provisions themselves. Probably the widest permitted use is Business and Professional Offices which latitude is broad and encompassing. The City does have the power to zone property in its area, Ga. Constitution Code Section 2-1923, 69-1201 et seq., 69-801 et seq., and the zoning ordinance appears completely reasonable. The City in a planned office center

district does not permit apartment units. This is a reasonable distinction followed in most zoning. The question then arises, did the Mayor and Aldermen of the City of Savannah by their refusal to amend the ordinance so as to permit apartments act arbitrarily and capriciously and by so doing deprive Gellis of the use of the optioned property? See *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, which states:

> "If the validity of the legislative classification for zoning purposes be fairly debatable the legislative judgment must be allowed to control."

Mr. Newton of the Metropolitan Planning Commission stated to The Mayor and Aldermen of the City of Savannah (A-194) that the creation of high-rise apartment buildings in line with the possible expansion of Hunter Army Air Field gave rise to objections and Mr. Savadge, Planning Director to the Metropolitan Planning Commission, (A-60) points out the traffic circulation problems and the parking problems which would be created by the proposed high-rise department development and further shows that Gellis never showed or was able to provide sufficient off-street parking to meet the requirements of the P-O-C ordinance. All of these are sufficient to show a legitimate exercise of police power so as to render the validity of the P-O-C zoning ordinance fairly debatable. *Euclid* v. *Ambler Realty Co.* supra.

In *Stone* v. *City of Maitland*, supra, the Court succinctly stated on page 7:

> "The notion 'that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely' has long been discarded. We have

> returned to the original constitutional proposition that courts do not substitute their social and economic belief for the judgment of legislative bodies, who are elected to pass laws.' *Ferguson v. Skrupa,* 1963, 372, U. S. 726, 730; 83 S. Ct. 28, 10 L.Ed. 2d 93 97."

It is contended that spot zoning is involved. The property in the instant case (A-102) fits very closely the property under scrutiny in the case of *Birdsey et al v. Wesleyan College,* 211 Ga. 583, where the court said:

"The rezoning of the defendant's property cannot properly be classed as 'spot zoning.' The property is entirely segregated from that of the plaintiffs by three public streets and other property of the defendant. 'Spot zoning' generally relates to action in 'lifting out' of a zoned area one unit, or one particular piece of property. While the area rezoned is not extensive (containing approximately 100,000 square feet), it is nonetheless segregated in the manner set forth. The rule that the reasonableness or unreasonableness of a 'spot zoning' ordinance is always a question for the court's determination, has no application in the present case. *Orr v. Hapeville Realty Investments,* 85 S.E. 2d, 211 Ga. 235."

The state courts of Georgia have held that "spot zoning" is not per se an unconstitutional exercise of police power. *Agnew v. Cruce,* 224 Ga. 216, 218, and *Bible v. Marra,* 226 Ga. 154, 173 S.E. 2d 346, hn. 13, syllabus 6 of the court's opinion.

It is contended that the character of the property has changed so as to now make the application of the zoning P-O-C confiscatory as to the property and thus unconstitutional. As a part of this contention it is alleged and

claimed that the property's highest and best value is for use of the property for apartment purposes. The highest and best value of the use of the property is not a criteria as to whether or not the zoning is confiscatory. In *Stone v. City of Maitland* it was shown that the value of the property for use of a service station was $135,000 whereas its value for any other use would not exceed $75,000. The court, in spite of this value difference, held that the zoning ordinance prohibiting the use of the property for a filling station bore a rational relationship to the legitimate police power objective of reducing traffic congestion and blight.

In examining the planned office center uses we find that Gellis's petition showed that he planned an office building (A-12) as well as apartment buildings for use on the premises so presumably Gellis himself decided that the property was usable as an office site, one of the primary uses and purposes of the planned office center ordinance. This admission of Gellis, combined with the other factors, clearly shows that, even though the zoning may not permit, in his opinion, the best financial use of the land, it is not so stringent in its restrictions as to be confisfiscatory. See also Byck (A-188) and Savadge (A-60) affidavits on use.

It was contended for the first time in the Court of Appeals that the P-O-C ordinance is unconstitutional by reason of vesting discretion in the Metropolitan Planning Commission. This was not contended in the lower court and was first raised on brief to the Court of Appeals.

Notwithstanding, if we do consider this point, it is to be noted that no additional restrictions were imposed on Gellis in this instance nor does he claim to have been aggrieved by the imposition of any additional restrictions by the Metropolitan Planning Commission.

The P-O-C zoning ordinance (A-113) spells out the design requirements, to-wit: the setback requirements, the size of the land, the depth of the tract, the kind of highway it would abut and then specifically states development standards which include minimum floor area, minimum site size, number of buildings, ratio of floor area to ground area, setback and screening, yard setbacks, off-street loading requirements and off-street parking requirements. The Metropolitan Planning Commission has not exercised any discretion but obtained a legal opinion from its attorney (A-141) that residential apartment buildings were not permitted in the P-O-C zone and also found the spelled-out design requirements for parking had not been met (A-60). The fact that the ordinance required that a development plan be submitted to the Metropolitan Planning Commission for approval by a committee thereof is not the vesting of a discretion but the exercise of an administrative act in reviewing the plan to see if it meets the requirements of the ordinance. This is certainly not an unlawful delegation of administrative authority in that someone would have to review and check the plan. It is inconceivable that the Aldermen themselves, in addition to exercising their legislative discretion, would personally review the plan to make sure that it met the design criteria. In this connection see *McCord et al* v. *Ed Bond & Condon Company, et al*, 175 Ga. 667.

It was contended for the first time in the Court of Appeals that the City must prepare a comprehensive plan prior to the adoption of the Planned Office Center ordinance. The P-O-C ordinance was, in fact, an amendment to the existing zoning of the City originally enacted after a comprehensive plan. Nothing in the Enabling Act requires a comprehensive plan in connection with later amendments. See Ga. Code Section 69-1210.

It was contended for the first time by oral argument in the Fifth Circuit Court of Appeals that there is no appeal from a decision of the Board of Zoning Appeals. Georgia Code Section 69-1211.1 provides for a judicial review of a Board of Zoning Appeals decision and this provision is applicable in this instance by reason of being the state law on the subject matter. No ordinance need be enacted by a municipality to effectuate this right of appeal. Factually, Gellis did not obtain any decision of the Board of Zoning Appeals but asked for a text amendment to the P-O-C zoning (A-58, A-189, A-192). In regard to this application, the Metropolitan Planning Commission was only a recommending body (A-60, A-148) and the Mayor and Aldermen of the City of Savannah exercising their legislative discretion, after a hearing did not enact the amendment (A-192).

## ISSUE 3

**THE PETITION AND AFFIDAVITS OF THE PLAINTIFF GELLIS DO NOT SHOW A CAUSE FOR DAMAGES UNDER SECTION 1985 OF THE CIVIL RIGHTS ACT AGAINST THE DEFENDANTS INDIVIDUALLY IN VIEW OF THEIR EXERCISE OF THEIR LEGISLATIVE DISCRETION AND THE AFFIDAVITS FILED ON THEIR BEHALF.**

Even Gellis's allegations show that the zoning complained of was enacted prior to the present incumbent officeholders being members of the governing council of the City and prior to Gellis's involvement with the property (A-6 thru A-8). The original zoning was certainly not directed against Gellis as a matter of bad faith nor could a conspiracy against him in the original zoning have been possible as he was not even remotely connected with the circumstances at that time (A-213). Therefore, it would appear that Gellis's sole complaint against the individual defendants deals with their failure to amend the text of the P-O-C zone at their public meeting while in the exercise of a legislative discretion (A-168, A-169, A-25).

Georgia grants zoning authority to its municipalities, Ga. Code Annotated Section 2-1923, Ga. Code Annotated Section 69-1201 et seq. In the exercise of such powers the City Council and any other board act within their legislative capacity and no civil rights action exists. *Morgan* v. *Thomas*, 207 Ga. 660; *Shellburne, Inc.* v. *Newcastle County*, 293 Fed. Supp. 237: *Norton* v. *McShane*, 332 Fed. 2d 855; *Miller* v. *Director, Middletown State Hospital*, 146 Fed. Supp: 64; *Nelson* v. *Akins*, 256 Fed. 2d 312.

See also *Richard Wallach* v. *City of Pagedale, Missouri*, 359 Fed. 2d 57, where it was stated upon the granting of a motion to dismiss that "no civil rights action exists by reason of enforcement of a lawful ordinance." Although in this case it is not first necessary that the ordinance be found lawful as the defendants in refusing to pass legislation were exercising a legislative function and within the scope of their office, the above indicates that, insofar as Gellis's suit seeking personal damages is concerned against the several individual defendants, this portion of his action was correctly dismissed.

In considering the allegation of conspiracy in the above, we should mention, in passing the decision of the court in *McGuire et al* v. *Todd* et al, 198 Fed. 2d 60, on page 63, where the court of Appeals for this Circuit said:

"We disregard, as mere conclusions, the loose and general, the factually unsupported, characterizations of the complained of acts of the defendants, as malicious, conspiratoral, and done for the purpose of depriving plaintiffs of their constitutional rights. . ."

The allegations of conspiracy, as shown by the petition and the affidavits of Gellis (A-21, A-25, A-30, A-36, A-64) are simply conclusions.

## CONCLUSION

The Court should deny the petition for a writ of certiorari because:

1. The Fifth Circuit Court of Appeals correctly decided the case.

2. No Federal question of substance is involved.

3. No important state or territorial question is involved.

4. The decision in no way conflicts with other applicable decisions of this court.

5. Accepted and usual course of proceedings have been followed.

Respectfully submitted,

JAMES B. BLACKBURN, ATTORNEY FOR THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH AND THE FORMER ALDERMEN, INDIVIDUALLY

JACK H. USHER, FORMER CITY ATTORNEY AND ATTORNEY FOR FORMER ALDERMEN, INDIVIDUALLY

JOHN W. SOGNIER, ATTORNEY FOR J. CURTIS LEWIS, JR., FORMER MAYOR, INDIVIDUALLY

JOHN G. KENNEDY, ATTORNEY FOR J. CURTIS LEWIS, JR., FORMER MAYOR, INDIVIDUALLY

May 16, 1972